FILED
NOV 27 1967
JOHN F. DAVIS, CLERK

Nos. 778, 832

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

ERIE-LACKAWANNA RAILROAD COMPANY, ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF APPELLEES THE PENNSYLVANIA RAILROAD COMPANY AND THE NEW YORK CENTRAL RAILROAD COMPANY TO AFFIRM

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November 27, 1967

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Appellees The Pennsylvania Railroad Company (Penn) and The New York Central Railroad Company (Central) respectfully submit that the final judgment of the District Court dismissing the complaints of appellants The Baltimore and Ohio Railroad Company (B&O), The Chesapeake and Ohio Railway Company (C&O), Norfolk and Western Railway Company (N&W), Western Maryland Railway Company (Western Maryland), Erie-Lackawanna Railroad Company (E-L) and The Delaware & Hudson Railroad Corporation (D&H) was correct and should be summarily affirmed.

STATEMENT

When this case was last before this Court, the Interstate Commerce Commission had not yet completed formulation of protective conditions to guard the traffic and revenues of E-L, D&H and Boston & Maine Corporation (B&M) following the Penn-Central merger and prior to the inclusion of those roads in a larger railroad system. At that time there were also pending undecided before the Commission applications of E-L, D&H and B&M for inclusion in the N&W system.

The Commission has since concluded the inclusion proceedings by determining that E-L, D&H and B&M have the right to be included in the N&W system on specified terms. (330 I. C. C. 780) The Commission has also formulated final protective conditions (330 I. C. C. 328), which have been accepted without challenge by the three carriers for whose protection they were designed, and has found that the public interest "requires" that the merger go forward "at the earliest possible date" (*id.* at p. 361). Its order in the Inclusion case has been unanimously affirmed by a statutory three-judge court for the Southern District of New York. The same Court has unanimously held that there is no reason for further delay of the already long-delayed Penn-Central merger and that such a delay might well result in "devastating hardship * * * to New England and New York" by blocking the only solution for the "critical situation of the New Haven." (B&O J. S., p. B-70)

N&W, its would-be merger partner C&O, and the latter's family lines B&O and Western Maryland continue, however, to seek further delay of consummation of the Penn-Central merger.[1] Indeed, their present position is a

[1]These appellants will herein be referred to as "appellants". When the contentions of E-L and D&H are discussed those appellants will be specifically identified.

further progression of their demands in terms of the duration of the delay sought. Originally in the District Court, and in their jurisdictional papers to this Court on the prior appeal, they urged that the merger should be postponed until the final formulation of protective conditions for E-L, D&H and B&M. In their briefs on that appeal their demand was expanded to encompass delay until the N&W Inclusion case had been disposed of. They now urge that even if the Commission's order in the Inclusion case is upheld by this Court, the Commission's order authorizing the merger of Penn and Central must nevertheless be set aside.

The factual predicate of appellants' argument is the claim that there is "serious doubt" that the stockholders of D&H will accept inclusion in N&W on the terms set by the Commission (B&O J. S., p. 10), and that it is an "established fact" that B&M will remain outside any major system and the District Court "has implicitly so found." (B&O J. S., pp. 10-11)[2]

The fact is that D&H unreservedly supported the Inclusion order in the District Court. In oral argument before that Court on September 28, 1967, counsel for D&H advised the Court that the Board of that company had just previously "unanimously resolved that the D&H would recommend [to its stockholders] inclusion terms as fixed by the Commission." The District Court, noting this fact and also noting that the cash terms fixed by the Commission were substantially more favorable to D&H stockholders than the average 1967 market price of D&H stock, found itself "unable to take seriously the possibility that D&H stockholders will reject their directors' unanimous recommendation to accept the inclusion terms." (B&O J. S., p. B-66)

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[2]At some points in their Jurisdictional Statement appellants go even further to claim that the District Court "conceded" that B&M would not be included in N&W under the Inclusion order. (See, *e.g.*, B&O J. S., p. 9)

The sole stated basis for appellants' alleged "serious doubt" as to the acceptability to D&H of the inclusion terms ordered by the Commission is a statement that was made by the President of D&H, some five weeks *prior* to the action of the directors just referred to, that the D&H Board was then exploring possible alternatives to inclusion in N&W. The District Court evidently concluded that the fact that *after* the issuance of this statement the D&H Board, of which the Company's President, who appellants claim represents its largest stockholder, is a member, unanimously expressed approval of the inclusion terms was sufficient to set at rest any "serious doubt" as to D&H's future course.

Although the Court below found that "the situation as to B&M differs since the price fixed by the Commission for its stock is well below the current market" (B&O J. S., p. B-67), the Court did *not* find and it is by no means established that B&M will ultimately reject the terms set by the Commission. Appellants attempt to treat as demonstrating the certainty of such rejection a statement in B&M's brief in the District Court in the Inclusion case to the effect that B&M would prefer denial of its petition for inclusion to acceptance of the terms prescribed by the Commission. (B&O J. S., p. 8) A request by B&M for denial of its petition and a refusal to accept inclusion on terms prescribed by the Commission are, however, entirely different matters. If B&M's petition had been denied it would under the order in this case have had the absolute right to seek inclusion in Penn-Central, whereas should it reject the Commission's Inclusion order no such right would exist. Accordingly, B&M will, if its pending appeal in the Inclusion case seeking a higher price fails, be faced with the question whether to accept the price set by the Commission or to be left with a pure gamble that it can negotiate better terms in another transaction and that approval of such a transaction can be

obtained from the Commission. There is simply no basis for any suggestion that it is "established" that B&M will select the latter course.

ARGUMENT

The facts set forth above show that the primary premise of the arguments of B&O, C&O, N&W and Western Maryland, that one of the three protected roads will surely choose to forego the right to inclusion in the N&W system and another is likely to forego that right, is without basis. We shall show, however, that even if that premise is accepted the decision below was correct and should be summarily affirmed. We shall also show that the limited and contingent challenge made by appellants E-L and D&H to the Commission's order is without merit.

I. The Commission's Order Authorizing Consummation of the Penn-Central Merger Is Consistent with This Court's Mandate

Appellants' first claim of error is that the Commission's order authorizing merger of Penn and Central violates the mandate of this Court in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372 (1967). The claim is made that the period during which the mandate forbade the Commission to permit Penn and Central to merge was not intended to end when the Commission issued an order providing an opportunity to E-L, D&H and B&M for inclusion in a larger rail system, or when its order providing such an opportunity had been reviewed by the District Court, or even when it had been reviewed by this Court. Rather, say appellants, this Court meant that Penn and Central might not merge until all of the named roads had actually been included in a larger rail system. Appellants press this argu-

ment although it has been disclaimed by all of the three roads whose inclusion is at issue, and to whose protection the prior opinion of this Court was directed.

This Court is, of course, the best judge of the meaning of its own mandate, and hence extended argument on this point would be superfluous. It is fair to state, however, that the implications of appellants' position are startling. E-L, D&H and B&M cannot, separately or together, be required against their will to accept inclusion in *any* rail system. Appellants are thus arguing that this Court has held that any one of these roads can by the simple device of refusing to accept fair and equitable inclusion terms set by the Commission permanently frustrate the Penn-Central merger, even though the Commission has determined that the merger will bring about large efficiencies and economies with consequent vast benefits to shippers and to the general public (327 I. C. C. at p. 491) and is necessary to permit Penn and Central to withstand the increasing challenge of the previously created N&W-Nickel Plate and C&O-B&O combinations (*id.* at p. 519), and that it is the only possible salvation for the New Haven (328 I. C. C. at p. 312; 330 I. C. C. at p. 361).

We submit that nothing in this Court's prior opinion suggests an intention thus to impair and derogate from the authority of the Interstate Commerce Commission to determine national transportation policy by placing its considered determination that the Penn-Central merger is in the public interest at the mercy of the wholly private interests of the stockholders of the three protected lines. We suggest that under this Court's mandate what the Commission was at most bound to do was to give E-L, D&H and B&M the *opportunity* for inclusion in a larger system on fair and equitable terms. And this the Commission has done.

Appellants themselves appear to shrink from the necessary implications of their own argument. Thus they urge that if the Commission had held that under no circumstances might E-L, D&H and B&M be included in the Penn-Central system "the stockholders of the protected roads would then have been obliged, as the only alternative to destruction by Penn-Central, to accept equitable terms from *the* system [N&W] in which the Commission found their inclusion to be in the public interest." (B&O J. S., p. 14)[3] The proposition is, of course, inconsistent with appellants' own argument as to the meaning of this Court's mandate. For if that argument were accepted the stockholders of the protected roads would on the stated hypothesis have had an additional alternative—to reject equitable terms from N&W and thereby prevent consummation of the Penn-Central merger.

II. The District Court's Affirmance of the Commission's Order Was Not Based on a Ground Entirely Different from That Relied upon by the Commission

Appellants argue that "the Commission expressly predicated its order in the *Merger* case on the assumption that the *Inclusion* order would be accepted by all three of the

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[3]It is not clear whether appellants contend that this Court's mandate itself required the Commission to make such a holding as to Penn-Central once it found inclusion in N&W to be in the public interest. Any such contention would be insupportable. The Commission had made it clear in its original report that the question whether inclusion of E-L, D&H and B&M, or any of them, in Penn-Central would be in the public interest was not at issue in and would not be decided in the N&W Inclusion case. (327 I. C. C. at pp. 530-31) This Court, in referring to the pendency of the N&W Inclusion hearings as making supportable a "short delay" in the Penn-Central merger, made not the slightest suggestion that it deemed an anticipatory determination of the kind referred to (which could not have been made in either the Penn-Central merger case or the N&W Inclusion case in the absence of additional evidentiary hearings directed specifically to the question) to be necessary or even appropriate.

protected railroads" (B&O J. S., p. 15), and that the District Court affirmed the Commission's order although making a contrary assumption. This, appellants urge, was a violation of the rule of *SEC* v. *Chenery Corp.*, 332 U. S. 194 (1947). It is unnecessary to accept appellants' invitation to follow them in drawing close distinctions between *Chenery* and such cases as *Massachusetts Trustees* v. *United States*, 377 U. S. 235 (1964), allegedly shown to be a precedent of narrow scope by the decision in *Labor Board* v. *Metropolitan Life Insurance Co.*, 380 U. S. 438 (1965). For the fact is that the Commission did not, "expressly" or otherwise, predicate its Penn-Central order on any assumption of the kind stated by the appellants.

Appellants purport to find the alleged express predicate in passages of the Commission's opinion that are claimed to demonstrate that the Commission specifically rested its decision on a belief that the duration of the protective conditions that it prescribed to guard the traffic of E-L, D&H and B&M from Penn-Central would be relatively short since those roads were certain to be actually included in N&W pursuant to the Inclusion order.

Contrary to appellants' claim, the Commission was fully aware that it was possible that the Inclusion order would not be accepted by all three beneficiaries of the order, and its order authorizing the Penn-Central merger was not based on any assumption that such a consequence was not possible. This is demonstrated beyond reasonable dispute by the fact that in its report in this case dated June 9, 1967, the date also of its report directing N&W to accept the inclusion of the three protected lines, the Commission expressly recognized that the event that would terminate the effectiveness of the protective conditions would as to some or all of the protected roads not necessarily be their inclusion in N&W pursuant to the Inclusion order. In defining

the "protected period"—the period during which the protective conditions would remain effective—the Commission provided that as to each protected carrier it would end "on any date when * * * the inclusion of such protected carrier in a Railway System which includes Norfolk & Western Railway Company *or* any successor thereto, *or* in the Railway System to be operated by the merged company [Penn-Central] shall have been effected * * *." (330 I. C. C. at p. 362) (Emphasis added) If, as appellants urge, the Commission believed it certain that inclusion of all three lines would take place pursuant to the N&W Inclusion order, it would hardly have thus formulated and promulgated a provision in which such inclusion was stated as only one of three different possibilities. Appellants' argument that a basic premise in the Commission's approval of Penn-Central was that the protected period was certain to end with inclusion of all three protected lines in the present N&W pursuant to the current Inclusion order plainly cannot survive in the light of the quoted provision.

III. The Commission Considered and Properly Rejected the Claim That the Protective Conditions Will Injure Appellants

Appellants claim that the Commission's order authorizing the merger of Penn and Central must be set aside because the Commission failed to consider the consequences that the protective conditions which it adopted would have if those conditions were to have an "indefinite duration." (B&O J. S., p. 19).

As we have shown above and the District Court found, there is no reasonable basis for anticipating that the protective conditions will have other than a very brief duration at least as to E-L and D&H because the former has accepted and the latter is virtually certain to accept the terms for inclusion in N&W that the Commission has tendered

them. In any event, again as we have shown above, the Commission did recognize that it was possible that the protective conditions would not be terminated with an inclusion of the three roads in N&W pursuant to the present Inclusion order, and contrary to appellants' contention the Commission's findings that the protective conditions would not cause substantial injury to appellants did not depend on any assumption that they would be terminated by any such event.

Appellants rely on a reference in the Commission's report to the prospect of a "relatively short" protected period and on a statement that the protected lines would act in the expectation that they would become affiliates of N&W. There is no basis for appellants' assumption that the Commission, in referring to a "relatively short" protected period, assumed inclusion of the three protected roads in N&W. In its prior report in this case the Commission used precisely the same term—"relatively short"—to describe the period that would elapse prior to the time the petitions of E-L, D&H and B&M "for inclusion *in one of the larger carrier systems* are acted upon." (328 I. C. C. at p. 327) (Emphasis added)[4] And a reading of the pertinent portion of the Commission's opinion shows that the findings that the protective conditions would not unduly injure appellants were based on substantial grounds entirely independent of any question of the expectation of the protected lines as to their future. The Commission made separate, independent and self-sufficient findings on the questions of (a) power to act in a way that would injure appellants by

[4]It may be noted that contrary to appellants' implication, the reference in the Commission's opinion to a "relatively short" protected period occurs not in any discussion of the effect of the protective conditions on appellants but rather in an entirely separate passage rejecting a claim by Penn and Central that a 50% indemnity factor for compensating the protected lines for loss of traffic was unduly high. (330 I. C. C. at p. 350)

traffic diversion activities, and (b) motive so to act. It specifically found that "clearly the intervening railroads have failed to show that there is a likelihood of power in the protected railroads to effect the diversions claimed," and that conversely "it is a matter of geography that Penn-Central will be unable to substitute either B&M or D&H" (the two roads that appellants foresee as potentially not being included pursuant to the Inclusion order) for other railroads. (330 I. C. C. at p. 355) And although in the additional finding as to lack of motivation the Commission referred to the protected lines' expectation of becoming affiliates of N&W, it also rested on the risk of retaliation by N&W or rescission by the Commission of the protection accorded by the conditions in the event of manipulation of traffic routings. (*Ibid.*)

In the District Court appellants also urged that consummation of Penn-Central would tend to force any of the three protected railroads not included in N&W pursuant to the Inclusion order into Penn-Central. In rejecting this contention on a number of grounds, the Court noted that "N&W is fully protected by its right to oppose inclusion of any of the three roads in Penn-Central." (B&O J. S., p. B-18)

Appellants argue that this right is not sufficient because once the Penn-Central merger is consummated the Commission will surely override any protest by N&W on the ground that B&M can survive only by inclusion in the Penn-Central system. This argument gives insufficient recognition to the authority, the independence and the integrity of the Commission. If B&M should reject terms for its inclusion in N&W that the Commission has found to be fair and that have been affirmed on judicial review the present orders of the Commission give B&M no right to inclusion in Penn-Central. If it should seek approval in a new proceeding based on a voluntary agreement with Penn-

Central it has no assurance that the Commission would find such inclusion to be in the public interest. There is no warrant for the assumption that in those circumstances the Commission would be forced to approve inclusion in order to save B&M from extinction. A denial of inclusion would not doom B&M. Rather, the result of such a denial would likely be to make B&M receptive to an offer from the present N&W system, or from any successor system that may emerge from the N&W-C&O merger application currently before the Commission. Indeed, this would appear to be the thrust of appellants' own argument that the way to get B&M into the N&W system is to foreclose its entry into Penn-Central. The difference between that argument and the possible sequence of events described above is that appellants demand that the Commission *now* make a determination that is in every sense premature.

IV. The Commission Correctly Found That the Merger of Penn and Central Subject to the Protective Conditions Is in the Public Interest

Appellants also argue that the Commission's order approving the merger of Penn and Central must be set aside because the Commission allegedly made no findings with respect to the public interest in consummating the merger "so long as it must be subject to [the protective conditions] for an indefinite period." (B&O J. S., p. 27) It is claimed that "the undisputed evidence of record showed that there could be no substantial merger savings or public benefits from the merger" during the protected period and that the Commission wrongly ignored this fact in authorizing prompt consummation. (*Ibid.*) There are several fatal difficulties with this argument.

First, appellants' argument is premised on the proposition that the protective conditions will cause substantial injury to them and to other Eastern railroads and that this

injury must be weighed against any benefits to be derived from the Penn-Central merger. As we have shown above, the Commission correctly rejected appellants' claims of such injury on the ground that the claims had not been established by the evidence, and did not rest its rejection on any assumption as to the duration of the protected period. For this reason, contrary to appellants' suggestion there was no "imposition of harm upon other railroads" (B&O J. S., p. 26) against which the benefits of the merger had to be weighed.

Second, in claiming that the protective conditions prevent the realization of any merger benefits for the "forseeable future" (*id.* at p. 28), appellants lose sight of the fact that even accepting their own arguments it would be only B&M (and possibly D&H) that would be a beneficiary of the protective conditions for more than a brief period following affirmance of the Inclusion order. It is E-L that is the largest of the three protected lines and the one that is the most broadly competitive with Penn-Central. Thus even appellants must concede that as soon as the protected period ends as to E-L, although remaining in effect as to B&M or even B&M and D&H, Penn-Central will be free to proceed to accomplish a large part of the public and private benefits of their merger.

Third, despite appellants' unwillingness to recognize the fact, the protective conditions would not, even if remaining in effect as to all three protected roads for a substantial period of time, cancel the merger benefits for that period, and the Commission has so found.[5] The Commission rec-

[5]It is noteworthy that C&O-B&O, in their Petition for Reconsideration of the Commission's April 6, 1966, order, argued (at pp. 10-11), contrary to their present position, that even during the protected period Penn-Central would be able to make extensive service improvements, and indeed that this was itself a reason for delaying the merger because the improvements would allegedly be channelled toward the areas in which C&O-B&O and other "unprotected lines" operate.

ognized that the savings and efficiencies of the merger would to a large extent be brought about by a "program of extensive capital improvements scheduled over a 4-year period." (327 I. C. C. at pp. 489-90) It recognized also that "a day's delay at the outset of the undertaking can only mean a day's delay at its conclusion, and, thus, every day that consummation is postponed denies the shipping and consuming public, as well as the management and owners of these railroads, the many benefits which we found stem from the transaction we approved." (328 I. C. C. at p. 312) Appellants persist in treating the consolidations and capital improvements that the merger will make possible as if they will be completed—and cause traffic diversion in violation of the protective conditions—the moment they are begun. There is no basis in the evidence or in reason for any such assumption. As the District Court recognized and as is apparent from the face of the protective conditions, nothing in them "prevents the realignment of management, the elimination of many duplications in personnel, the undertaking of financing, or the refurbishing and, in many cases, the implementation of plans for better and more economical service." (B&O J. S., p. B-15) Until Penn and Central are merged, none of these undertakings can be even begun. And each day of delay in the beginning is a day's delay in the ultimate accomplishment.

Appellants assert that N&W introduced evidence showing that "under the prescribed conditions savings could not be achieved in any of the areas mentioned by the district court." (B&O J. S., p. 28) Not only was the testimony in question, consisting of only four pages of general opinions, thoroughly discredited on cross-examination (Tr. 21733-67), but more important it was simply not germane to the point here under discussion. The relevant question is not whether Penn-Central will accomplish large savings immediately upon merger, with or without the protective con-

ditions, but rather whether the protective conditions will altogether prevent them after merger from taking steps that will in due course result in better service and financial savings. Neither the testimony to which appellants refer nor any other evidence of record permits an affirmative answer to this question.

In its report dated June 9, 1967, in which the Commission formulated final protective conditions for E-L, D&H and B&M, it considered and rejected the contention that Penn and Central should not be permitted to proceed with their merger prior to inclusion of the three lines because the conditions would make impossible the realization of merger benefits. Stating that it adhered to its conclusion that prompt consummation of the merger should be authorized, the Commission said (330 I. C. C. at p. 361):

> "We would note at this point that preliminary reports of earnings of eastern railroads for the first quarter of 1967 generally reflect a substantial decline from levels reached in the first quarter of 1966. First quarter net railway operating income of the eastern carriers totaled $71.3 million in 1966, compared with $31.3 million for the same period of 1967. Both PRR and NYC have shared in that decline, with NYC in particular showing a deficit of approximately $2 million from its transportation operations for the first 3 months of 1967. In our view, the public interest requires that the applicants be permitted to commence achieving the substantial savings which their merger will make possible at the earliest possible date. Similarly, the shipping public should not be denied the improved service which ultimately the merged company can provide."[6]

[6]The financial trends referred to in this passage have continued through the first three quarters of 1967. (See our Motion to Affirm in No. 835, p. 14 n. 6)

Both the Commission and the District Court recognized that a highly important benefit of prompt consummation of the Penn-Central merger will be the beneficial impact it will have on the critical situation of the New Haven. Appellants cannot contend that this merger benefit is one that will be impossible of accomplishment so long as the protective conditions are in effect. Rather, they are reduced to arguing that "it seems plain in principle" that a prompt merger of Penn and Central cannot be justified on the ground that it will save the New Haven. (B&O J. S., p. 29) If anything "seems plain in principle" it is that the Commission was fully justified in considering the plight of the New Haven as a factor militating strongly toward prompt consummation of the Penn-Central merger. But plain in principle or not this is precisely the kind of judgment that Congress has entrusted to the Commission, and appellants' suggestion that the Commission should have concluded that this consideration was outweighed by others presents no substantial issue of law for determination by this Court.

In their statement of Questions Presented, appellants purport to tender the question whether the protective conditions formulated by the Commission create a pooling arrangement within the meaning of 49 U. S. C. § 5(1) and if so, whether the Commission made the necessary findings to support the arrangement. (B&O J. S., p. 4) Because appellants have failed to make the statement required by Rule 15(f) of this Court of the reasons why this question is so substantial as to require plenary consideration for its resolution, the question is not properly before the Court. In any event, the District Court was plainly correct in finding both that on the facts the conditions imposed by the Commission did not constitute a pooling and that even if they did, the Commission had made findings sufficient to legalize them under Section 5 (1), and we rest on the District Court's discussion of those questions. (B&O J. S., pp. B-10-12)

V. The Penn-Central Merger Should Go Forward Even if the Inclusion Case Is Remanded to the Commission

Appellants, without troubling to argue the point, simply assume that "if the *Inclusion* order is set aside, the order permitting consummation of the merger must also be set aside." (B&O J. S., p. 10) E-L and D&H press the same view. This position does not withstand examination.

The Commission has now unanimously found for the third time that the public interest will be served by prompt consummation of the Penn-Central merger. It made this finding after having prescribed definitive conditions that will protect the transportation services of E-L, D&H and B&M pending the inclusion of those lines in a larger system. We submit that this Court should now affirm that finding and permit consummation of the merger even if it determines that it is necessary to remand the Inclusion case to the Commission for further consideration.

A remand of the Inclusion case to the Commission would create no problems that justify further postponement of the Penn-Central merger. As the District Court pointed out, a remand responsive to the arguments advanced by B&M would facilitate inclusion of B&M in the present N&W system, not prevent it. (B&O J. S., p. B-69). If the remand were because of arguments advanced by N&W, the Commission would, again as the District Court pointed out, be in a position on the present record readily to make new or additional findings prescribing terms for the inclusion of the three protected lines in the present N&W system as favorable as those fixed by the present order (*ibid.*), or alternatively could prescribe less favorable terms if it deemed that result warranted. The Commission has already found inclusion of the three roads in N&W to be in the public interest. There is, therefore, no reasonable basis for an assumption that a remand would preclude an order directing inclusion of the three lines in the present N&W system.

Even if it were to be assumed that the Commission on remand would find that the three roads should not or could not be included in the present N&W, the Commission has made it clear that in such an eventuality it will promptly consider whether they should be included in Penn-Central or in some successor to the present N&W system. A remand therefore does not create any serious possibility that the three roads will not be included in a larger system—particularly since the Commission and all of the railroads involved have recognized that such inclusion is an essential consequence of the rearrangement of the railroad structure in the Eastern part of the United States. Pending realization of such inclusion the transportation services of the three lines will be protected by the conditions prescribed by the Commission.

The posture of this case is now significantly different from what it was when it was previously before this Court. Then the Commission had found that conditions were necessary to protect the transportation services of the three carriers pending their inclusion in a larger system but had not completed its task of prescribing these conditions. On those facts this Court held that the Commission had "failed to provide the very protection that it at the same time declared indispensable to the three roads" and accordingly that its conclusion that there should be prompt consummation of the Penn-Central merger could not be sustained under the Commission's own findings. (386 U. S. at p. 389) In those circumstances the Court expressed the view that the Commission should complete the then pending Inclusion proceeding which the Court assumed could be done in a "relatively short time." (*Id.* at p. 392) By prescribing definitive conditions that will safeguard the three lines pending their inclusion in a larger system the Commission has now provided the protection that it found was essential.

It has therefore removed the infirmity in its findings that led this Court to its prior holding.

The Commission is charged by law with the regulatory administration of the rail industry. It has here faced the problem of devising an accommodation and protection of a variety of competing and conflicting interests. It and the District Court have both unanimously found that prompt consummation of Penn-Central is in the public interest, in part because the situation of the New Haven is critical and capable of satisfactory solution by prompt consummation of the Penn-Central merger and by no other means. To permit any temporary imperfection in the Commission's present disposition of the Inclusion case to block consummation of the merger would be to substitute certain injury to the public that the merged system will serve and to the applicants, and certain disaster for the New Haven and the public which it serves, for what is in reality merely a theoretical doubt that E-L, D&H and B&M, protected by the conditions imposed by the Commission in the meantime, will with reasonable promptitude find their place in a larger system.

VI. The Commission Did Not Err in Declining to Reserve Jurisdiction to Impose a Capital Loss Indemnification on Penn-Central for the Benefit of E-L and D&H

Before the Commission E-L and D&H argued that if the terms of their inclusion in N&W should be reduced because of the impact of Penn-Central on their traffic, Penn-Central should be required to pay their security holders an amount equal to the reduction caused by this impact. The Commission declined to reserve jurisdiction to consider the payment of such a capital indemnity on the ground that it had found in the Inclusion case that E-L and D&H will suffer no capital loss as a result of the Penn-Central merger

because that merger will not detract from their value to the N&W system. (330 I. C. C. at pp. 359-60) Although E-L and D&H now contend that these findings of the Commission are valid and should be affirmed, they also argue that the Commission erred in failing to reserve jurisdiction to provide for a capital indemnity payment against the chance that the findings might be set aside on judicial review and the possibility that on remand the Commission might find it necessary to fix terms for their inclusion in N&W that reflect a diminution in value caused by the Penn-Central merger. (E-L J. S., pp. 8-11)

This argument, even on the contingency that it assumes, is without merit. It presupposes that the Commission has authority that is not conferred upon it by the Interstate Commerce Act. The power of the Commission under Section 5(2)(b) to prescribe conditions to a merger transaction is not unlimited. It can only prescribe conditions that are reasonably related to the public interest standard of the section. (*United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311 (1931)) The public interest standard is confined to matters that are directly related to "adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities." (*New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 25 (1932))

The payment of a capital indemnity as suggested by E-L and D&H is not authorized by the statutory standard. Once E-L and D&H are included in N&W, their former security holders will have no responsibility for or relation to the preservation of adequate transportation service. The payment of money to those security holders would not promote adequacy of transportation service or have any other relationship to the public interest standard of Section 5(2)(b). A condition requiring such payments would,

therefore, be beyond the scope of the Commission's authority.[7]

It should be noted that a requirement for capital payments of this kind would be based on a rationale entirely different from that which authorized the Commission to provide for indemnity payments to E-L, D&H and B&M to compensate them for any loss of traffic that they may suffer by reason of the Penn-Central merger prior to their inclusion in a larger system. In the latter circumstances the purpose of the payment would be to preserve the transportation services of the three roads rather than merely to compensate private shareholder interests.

E-L and D&H attempt to establish a relationship between the suggested capital indemnity payment and the statutory standard by an argument that assumes that any lowering of the terms for their inclusion in N&W because of the impact of the Penn-Central merger on their traffic would not be "equitable" within the meaning of Section 5(2)(b). From that premise they argue that if the Inclusion order is reversed on grounds involving a rejection of the Commission's findings that the value of E-L and D&H to N&W will not be decreased by the Penn-Central merger, the Commission may not be able without imposing a capital indemnity to fix equitable terms for the inclusion of E-L and D&H in N&W; that it may subsequently find that the inclusion of E-L and D&H in Penn-Central would not be in the public interest; and that in those circumstances the service rendered to the public by E-L and D&H will be destroyed. (E-L J. S., p. 10)

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[7]This ground for affirming the refusal of the Commission to reserve jurisdiction to provide for capital indemnity is not precluded by SEC v. Chenery Corp., 332 U. S. 194 (1947). That case holds that when an agency acts within the scope of its delegated authority its decision cannot be affirmed on grounds not adopted by the agency. Its rationale does not apply when no question of administrative judgment is involved and when the only issue is whether the agency has statutory authority to grant the relief requested.

The legal premise of this argument is unsound. The statute provides no support for the assumption that terms for inclusion of E-L and D&H in N&W would not be "equitable" within the meaning of Section 5(2)(b) if they were to reflect any diminution in the value of the two roads that might be found to have been caused by the Penn-Central merger.

The security holders of E-L and D&H, like the security holders of other companies, are subject to the risk that the merger of their companies' competitors pursuant to valid regulatory authorization may impair the value of their securities. Nothing in the Interstate Commerce Act requires the Commission to provide for compensation for such impairment. When the Commission fixes terms for inclusion pursuant to its authority under Section 5(2)(b) it is obligated to compensate security holders for the actual economic value of their securities under all the circumstances. But the statutory concept of "equitable terms" does not require that economic value be determined on any artificial assumption that railroad security holders are to be held harmless from the consequences of lawful action taken by others pursuant to Commission authority. There is no rule of law that requires the Commission in setting equitable terms for the inclusion of a railroad to ignore any decrease in the economic value of the railroad caused by a collateral exercise of the Commission's regulatory power, and therefore no basis for the assumption of E-L and D&H that any terms for their inclusion in N&W fixed by the Commission that reflected traffic losses suffered by them as a result of the Penn-Central merger would not be "equitable."[8]

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[8]Compare the District Court's holding that the New Haven would not be entitled to compensation for traffic diversion caused by the Penn-Central merger if it were ultimately liquidated:

> "* * * we find nothing in the Interstate Commerce Act that would compel the Commission to require an operating railroad such as Penn-Central to reimburse creditors of a defunct one for losses due to merger diversion." (B&O J. S., p. B-30)

CONCLUSION

For the foregoing reasons, the judgment of the District Court dismissing the complaints of C&O-B&O, N&W, Western Maryland, E-L and D&H should be summarily affirmed.

Respectfully submitted,

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November 27, 1967